No. 93-134

SUPREME COURT, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

JACKEY B. GRIFFITHS,

Petitioner,

v.

CIGNA CORPORATION AND MARLENE GRAHAM,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Did the United States Court of Appeals for the Third Circuit apply the burden of proof standards in a pretext case under Section 704(a) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a) (1988) and Section 955(d) of the Pennsylvania Human Relations Act, 43 Pa. Cons. Stat. Ann. § 955(d) (1992), in a manner consistent with *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981) and its progeny *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) and *St. Mary's Honor Center v. Hicks*, 125 L. Ed. 2d 407 (1993).

2. Did the United States Court of Appeals for the Third Circuit properly exercise its broad discretion in interpreting and applying Pennsylvania law when it found that the Respondents did not "initiate" a malicious prosecution against the Petitioner.

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STATEMENT OF THE CASE

Procedural History

Jackey B. Griffiths ("Petitioner") sued CIGNA Corporation ("CIGNA") and Marlene Graham ("Ms. Graham") ("Respondents") alleging claims for race and national origin discrimination in violation of federal and state law, for retaliation for his filing a charge of discrimination and for the unlawful initiation of criminal proceedings against him.[1]

Trial began on March 10, 1992 and the district court directed a verdict in favor of Respondents on the claims of false arrest and imprisonment (Count VII), specific intent to harm (Count IX), and intentional infliction of emotional distress (Count X). Petitioner did not appeal the court's judgment with respect to these claims. The claims of defamation, retaliatory discharge and malicious prosecution went to the jury. On March 17, 1992, the jury responded to special interrogatories and found that Respondents did not make any false or defamatory statements about Petitioner, but that the employment of Petitioner was terminated in retaliation for his filing a charge of discrimination. Also, while the jury found that all of the significant facts that Respondents provided to the Philadelphia Police were true, the jury concluded that Respondents were liable for malicious prosecution.

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1. Petitioner's complaint contained ten counts: *Count I*: Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (race and national origin) (hereinafter, "Title VII"); *Count II*: Title VII (retaliation); *Count III*: The Pennsylvania Human Relations Act, 43 Pa. Cons. Stat. Ann. § 955 *et seq.* (hereinafter "PHRA") (National Origin Discrimination); *Count IV*: The Pennsylvania Human Relations Act, 43 Pa. Cons. Stat. Ann. § 955 *et seq.* (Retaliation); *Count V*: The Civil Rights Act of 1866, 42 U.S.C. § 1981 (National Origin Discrimination); *Count VI*: Malicious Prosecution; *Count VII*: False Arrest and Imprisonment; *Count VIII*: Defamation; *Count IX*: Specific Intent to Harm; *Count X*: Intentional Infliction of Emotional Distress.

Prior to trial Petitioner withdrew his claims based on national origin discrimination (Counts I, III and V) and pursued only his claims for retaliation pursuant to state and federal statutes and his common law claims.

On the retaliatory discharge claims the jury awarded Petitioner $50,000.00 in compensatory damages against Respondents and $100,000.00 in punitive damages against CIGNA. On the malicious prosecution claim the jury awarded $27,500.00 in compensatory damages against Respondents and $150,000.00 for punitive damages against CIGNA and $50,000.00 against Ms. Graham. On March 18, 1992 the district court entered judgment against Respondents in the amount of $77,500.00 for compensatory damages and $250,000.00 against CIGNA and $50,000.00 against Ms. Graham for punitive damages.

On April 1, 1992, Respondents filed a Motion for New Trial and for Amendment of the Judgment based on errors of law committed by the district court in connection with its submission of jury charges and special interrogatories on the malicious prosecution and retaliatory termination claims and on evidentiary rulings. On May 13, 1992, after oral argument on the Motions for New Trial and Amendment of the Judgment, the district court issued a bench ruling and opinion denying all of Respondents' post-trial motions. An Order denying the post-trial motions was entered May 14, 1992, and on May 19, 1992, Respondents filed a timely Notice of Appeal.

After briefing and oral argument, the United States Court of Appeals for the Third Circuit reversed the district court's denial of the post-trial motions.[2] In reversing, the panel was unanimous on the retaliation claims. On the state law malicious prosecution claim, the majority held that judgment should be entered for Respondents.[3]

Statement Of The Facts

On January 2, 1985, Ms. Graham hired Petitioner to work at CIGNA as a part-time security guard. He was made a full time

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2. The Third Circuit remanded the case to the district court for entry of judgment in favor of the Respondents on the malicious prosecution claim and for a new trial on the retaliation claims.

3. In a concurring and dissenting opinion Judge Seitz opined that on the malicious prosecution claim the trial court erred only by improperly submitting the issue of want of probable cause to the jury thereby warranting a new trial and not entry of judgment for Respondents.

security guard and was later promoted to assistant supervisor. Petitioner was assigned to guard a building at 1600 Arch Street, Philadelphia, referred to as the "Home Office" and a newer building connected to it called the "Tower building".

From fall 1989 through spring 1990, CIGNA lost approximately $105,000.00 because of a series of thefts of computers from the Home Office and Tower buildings. Ms. Graham investigated the thefts, made internal reports of her investigation and reported the thefts to the Philadelphia Police. Between the evening of March 12, 1990 and early morning of March 13, 1990, computer equipment was again stolen. This time the thefts occurred in a locked area at CIGNA's offices on the fourth floor of the Tower building. Ms. Graham reported the theft to the Philadelphia Police. At the time, Ms. Graham was assistant director of security and Petitioner's supervisor. On March 20, 1990 Ms. Graham produced a three page report about the thefts (hereinafter referred to as the "Computer Theft Report"). On or about March 21, 1990, Ms. Graham sent the Computer Theft Report to Detective Dennis Nast of the Philadelphia Police. The Computer Theft Report stated in part:

> Investigations have been conducted and reports submitted on all incidents. Information gathered concerning the latest thefts *suggest* that assistant supervisor Jackey Griffiths working in conjunction with a former CIGNA security officer *Tony Bolton may be* responsible for some if not all of the computer thefts.

(emphasis added).

The suggestion that Mr. Bolton as well as Petitioner might be responsible was based on the information contained in the report. The report noted, *inter alia*, that there was no sign of forced entry in the area from which the computers were stolen, that Petitioner had a master key to the area, that Mr. Bolton, a former security officer fired by CIGNA, often called Petitioner at work and on the night of the latest computer theft his call was transferred to Petitioner at an office on the same floor where the theft occurred, and that either Petitioner or Mr. Bolton were working at the times of all reported thefts. The Computer Theft Report did not state that Petitioner stole the computers and it did not request that the police arrest or prosecute Petitioner.

After Ms. Graham sent the Computer Theft Report to the police, she turned the entire matter over to the law enforcement authorities for whatever action they deemed appropriate. She felt that "the responsibility [of the investigation] was that of the Philadelphia Police Department." The jury found that all of the significant facts which Respondents provided to the police were true.

Contrary to Petitioner's statement of the facts, the police did conduct an investigation and did not rely "totally on documents and information supplied by (Ms. Graham)." Detective Nast conducted an investigation and interviewed CIGNA employees, including the person who last saw the computers and Mr. Harrison, a security guard who was on duty at the time of the most recent computer theft. Based upon his investigation and consideration of the information contained in the Computer Theft Report, which both Detective Nast and the jury found to be true, Detective Nast made out an affidavit of probable cause to secure a warrant for the arrest of Petitioner alone. He submitted the affidavit to the charging unit of the office of the District Attorney for Philadelphia for a determination of whether the facts submitted constituted probable cause. An attorney with the District Attorney's office made a determination that there was probable cause to believe that Petitioner stole the computer equipment. Detective Nast then submitted an affidavit of probable cause to the bail commissioner, a judicial officer of the Court of Common Pleas for Philadelphia County. The bail commissioner reviewed it and also found that the facts constituted probable cause and he therefore issued a warrant for the arrest of Petitioner to answer the complaint of Detective Nast. The Philadelphia Police arrested Petitioner on April 13, 1990. On April 23, 1990, the charges against Petitioner were dismissed after a preliminary hearing.

On March 13, 1990, the same day the most recent computer theft was discovered, Petitioner filed a discrimination charge with the Equal Employment Opportunity Commission ("EEOC") alleging race and national origin discrimination against CIGNA because it promoted two black native born

Americans to the position of supervisor instead of him. Petitioner also filed a disability claim, asserting that he was disabled due to stress. He never returned to work for CIGNA.

On April 4, 1990, over two weeks after she submitted the Computer Theft Report to the police, Ms. Graham learned for the first time that Petitioner filed a charge of discrimination.

On or about May 1, 1990, Ms. Graham sent Petitioner a letter directing him to contact the Corporate Audit Division of CIGNA and to cooperate in their investigation of the computer thefts, which occurred the last night he was on duty. On or about May 5, 1990, Petitioner contacted Maria Sabasino of Corporate Audit but refused to speak to her except through his attorney. CIGNA considered Petitioner's refusal to cooperate with its investigation grounds for termination and terminated his employment effective May 4, 1990.

On appeal, Respondents argued that in light of the factual record, the district court committed errors of law in the jury charges and special interrogatories on the malicious prosecution and the retaliation claims. Specifically, on the claim of malicious prosecution, the district court instructed the jury that Respondents had a duty to undertake a reasonable investigation prior to submitting information to the police, had to determine the significant facts and then had to disclose those facts to the police. With respect to the retaliation claims, the district court instructed the jury on the causation element with several confusing and inconsistent standards, including its statement that Petitioner had the burden to prove only that retaliation was "one of the reasons" for CIGNA's decision to terminate Petitioner's employment.

The Third Circuit held that the Respondents were not liable for malicious prosecution because under Pennsylvania law they had not "initiated" criminal proceedings against Petitioner. The circuit court also found that the district court incorrectly charged the jury on the burden of proof with respect to the causation element for the retaliation claims.

SUMMARY OF THE ARGUMENT

The Third Circuit applied *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), as interpretated in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), to conclude that in a pretext case a plaintiff's claim is that discrimination is the sole cause of the employment action. This derives directly from *Burdine* which has as its premise that in a pretext case either a legitimate or an illegitimate set of considerations led to the challenged decision, but not both. *Price Waterhouse*, 490 U.S. at 247. The Court in *St. Mary's Honor Center v. Hicks*, 125 L. Ed. 2d 407 (1993), reiterated that under *Burdine* a plaintiff in a pretext case must prove that discrimination was the true reason for the employment action. Thus, the Third Circuit's statement that the claim in a pretext case is that discrimination is the sole cause of the employment action is supported by and logically follows from this Court's precedent and no appellate court has interpreted *Price Waterhouse* in an inconsistent manner.

The Third Circuit reasonably concluded that Respondents did not "initiate" a malicious prosecution. The Third Circuit held "that when a person supplies accurate information to the police [as did Respondents], that person, regardless of her motives and her actions in withholding other information, cannot be regarded as being responsible for the institution of criminal proceedings, so long as the police retain complete discretion in determining whether to prosecute, and so long as that person did not conceal additional information requested by the police." (A. 37-38.) The Third Circuit's interpretation of state law derived from interpretation and application of comment g to Section 653 of the Restatement (Second) of Torts. Every appellate court decision considering the "initiation" element issue applied comment g principles. No Pennsylvania Supreme Court case, including the case cited by Petitioner, *Simpson v. Montgomery Ward*, 46 A.2d 674 (Pa. 1946), squarely addressed the "initiation" element issue. The Third Circuit's interpretation and application of Pennsylvania law is therefore reasonable and review is not warranted.

ARGUMENT

I. THE THIRD CIRCUIT'S APPLICATION OF THE "PRETEXT" BURDEN OF PROOF STANDARDS IS FIRMLY GROUNDED IN AND SUPPORTED BY *TEXAS DEPARTMENT OF COMMUNITY AFFAIRS V. BURDINE* AND ITS PROGENY, *PRICE WATERHOUSE V. HOPKINS*, AND *ST. MARY'S HONOR CENTER V. HICKS*, AND THERE IS NO CONFLICT AMONG THE CIRCUITS

The Third Circuit found reversible errors in the trial court's jury charge on the plaintiff's burden of proof for his retaliatory discharge claims under Title VII and the PHRA because the charge did not comport with the standards enunciated in *Burdine*, 450 U.S. 248 (1981), as refined in *Price Waterhouse*, 490 U.S. 228 (1989).[4]

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4. The jury charge on the retaliatory discharge claim was:

If an employee is fired, that is, discharged or terminated by the employer because the employee had filed a charge of employment discrimination, both federal and state law provide that the employee may sue the employer in court for all damages that the employee suffers as a result of the discharge.

If, however, he was fired for or discharged or terminated for totally different reasons and in no way to retaliate against him because he had filed charges, then the employer would not be liable.

. . . .

Thus, in this case if a *motivating factor*, that is, if *one of the reasons for* terminating Jackey Griffiths as an employee was to get back at him or in response or return for his having filed a charge of employment discrimination against CIGNA, CIGNA will be liable for such damages as resulted from the termination of his employment.

On the other hand, if the fact that Jackey Griffiths had filed a charge of employment discrimination against CIGNA which was then known to CIGNA, *played no part* in the decision of CIGNA to terminate his employment, regardless of whether you think he was otherwise unfairly treated, he would have no cause of action under the evidence presented in this case.

If he would not have been discharged *but for* the fact that he had filed the employment discrimination charges against CIGNA, then retaliation would be *a motivating factor*.

If he would have been fired in any event or terminated, and the fact that he had filed an employment discrimination charge played no

Petitioner limits his challenge on the retaliation claims to the Third Circuit's statement that in a pretext case "the claim [for the plaintiff] is that the discriminatory motive was the sole cause of the employment action."[5] (A. 50.) The Third Circuit applied the standards established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), *Burdine*, 450 U.S. 248 (1981), and *Price Waterhouse*, 490 U.S. 228 (1989), to determine whether the jury charge was proper and identified distinctions in the burden of proof requirements for "pretext" and "mixed motives" cases of discrimination. (A. 41-47.)

The causation analysis under Title VII starts with an interpretation of the words "because of" contained in 42 U.S.C. § 2000e-2(a).[6] *See Price Waterhouse*, 490 U.S. at 240-241. In a mixed motives context, "because of" does not mean "solely

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NOTES *(Continued)*

part in bringing about his discharge, CIGNA would not be liable for a retaliatory discharge.

. . . .

Defendants have provided a non-discriminatory valid explanation but plaintiff claims that he has established by a preponderance of the evidence that the explanations are a *pretext* or a *sham* and that in actuality, *at least one of the motivating factors* was retaliation against him, *even though there may have been other valid reasons*.

(A. 40-41.) (emphasis added).

5. Since Petitioner's challenge relates to the sole cause statement, Respondents do not reiterate the general standards for a retaliation discrimination case as previously set forth by the Third Circuit and Petitioner. (A. 41-42.)

6. Section 2000e-2(a) states in pertinent part:

(a) Employer practices. It shall be an unlawful employment practice for an employer –

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, *because of* such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a) (emphasis added).

because of" because mixed motives cases involve proof that the adverse employment decision resulted from a mixture of legitimate reasons and prohibited discriminatory motives. *Id.* at 241-42.

Price Waterhouse compared its mixed motives facts to the facts presented in the pretext cases of *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 282 n.10 (1976), and *Burdine*. In so doing, this Court in *Price Waterhouse* explained that, in the context of a pretext case, "because of" can only mean "solely because of." *See Price Waterhouse*, 490 U.S. 228, 240-241 (1989). In distinguishing *McDonald*, this Court noted that "*McDonald* dealt with the question of whether the employer's stated reason for its decision was *the reason* for its action; unlike the case before us today, therefore, *McDonald* did not involve mixed motives." *Price Waterhouse*, 490 U.S. at 240 n.6. *Price Waterhouse* distinguished *Burdine* because "the premise of *Burdine* is that *either* a legitimate *or* an illegitimate set of considerations led to the challenged decision." *Id.* at 247. The Third Circuit's "sole cause" analysis is derived directly from *Burdine*'s "either" "or" framework and therefore is totally consistent with the decisions of this Court. (A. 42.)

This Court in *Price Waterhouse* noted that "[its] holding casts no shadow on *Burdine*, in which it stated that, even after a plaintiff has made out a *prima facie* case of discrimination under Title VII, the burden of persuasion does not shift to the employer to show that its stated legitimate reason for the employment decision was *the true reason*." *Price Waterhouse*, 490 U.S. at 245. (citing *Burdine*, 450 U.S. at 256-58) (emphasis added).

Proving that *Price Waterhouse* casts no shadow on the *Burdine* analysis, *St. Mary's Honor Center v. Hicks*, 125 L. Ed. 2d 407 (1993), reiterated that *Burdine* still requires that after a defendant carries its burden to produce a legitimate nondiscriminatory reason for its action, the presumption raised by the *prima facie* case is rebutted and "the plaintiff then has the full and fair opportunity to demonstrate through presentation of its own case and through cross-examination of the defendant's witnesses that the proffered reason was not *the true reason* for

the employment decision and that race was." *Id.* (citing *Burdine*, 450 U.S. at 256) (emphasis added). In meeting this burden *Hicks* further elaborated that "a reason cannot be proved to be a pretext for discrimination unless it is shown both that the reason was false, and that discrimination was *the real reason*." *Id.* at 418-19 n.4 (emphasis added). Both *Hicks* and *Price Waterhouse* analyze a pretext case as requiring that discrimination be "the" reason for the adverse employment action, rather than merely "a" reason. Thus, under *Hicks*, it is insufficient to give a pretext jury instruction such as that offered by the trial court below [that if "one of the reasons" for the adverse employment action was discrimination, then the employer is liable].

The Third Circuit's pretext analysis stands neither alone from nor in opposition to the other circuits, notwithstanding Petitioner's suggestion to the contrary. Applying *Price Waterhouse*, the court in *Foster v. University of Arkansas*, 938 F.2d 111 (8th Cir. 1991), *reh'g denied*, U.S. App. LEXIS 19126 (8th Cir. Aug. 19, 1991), endorsed a "sole factor" jury charge for the causation element of a pretext claim.[7] *Id.* at 115-16. The *Foster* court distinguished between mixed motives and pretext cases finding that "a pretext claim would become indistinguishable from a mixed motives claim" if discrimination need not be the sole factor. *Id.* at 115. The court in *Ostrowski v. Atlantic Mutual Insurance Companies*, 968 F.2d 171 (2d Cir. 1992), also parallels the Third Circuit's analysis stating that as "*Price Waterhouse* pointed out, a pretext case is one in which there was either unlawful motivation or lawful motivation, but not both; a mixed motives case is one in which there were both lawful and unlawful motivations." *Id.* at 185.

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7. The instruction read:

> The first question you should answer is whether plaintiff has proven by a preponderance of evidence that race was *the determining factor* in his termination and has also proved that the legitimate reason for termination offered by defendants are merely pretext to disguise the true reason. The term "determining factor" means *the sole factor* which determined the plaintiff was to be terminated.

Foster, 938 F.2d 111, 115 (8th Cir. 1991) (emphasis added).

Close scrutiny of the cases cited by Petitioner does not reveal disagreement among the circuits regarding the Third Circuit's interpretation of *Price Waterhouse*. These cases were either decided before *Price Waterhouse*, *see Holzman v. Jaymar-Ruby, Inc.*, 916 F.2d 1298 (7th Cir. 1990); *Chappell v. GTE Products Corp.*, 803 F.2d 261 (6th Cir. 1986), *cert. denied*, 480 U.S. 919 (1987); *Wilkins v. Eaton Corp.*, 790 F.2d 515 (6th Cir.), *reh'g denied*, 797 F.2d 342 (6th Cir. 1986); *Hagelthorn v. Kennecott Corp.*, 710 F.2d 76 (2d Cir. 1983); *Loeb v. Textron, Inc.*, 600 F.2d 1003 (1st Cir. 1979); or involved cases which never addressed the *Price Waterhouse* issue of distinguishing burdens of proof in pretext and mixed motives cases, *see Boddie v. City of Columbus*, 989 F.2d 745 (5th Cir. 1993) (involving only a claim under 42 U.S.C. §1983); *King v. General Electric Co.*, 960 F.2d 617 (7th Cir. 1992) (involving a claim under ADEA not interpreting *Price Waterhouse*); *Williams v. Valentec Kisco, Inc.*, 964 F.2d 723, 731 n.6 (8th Cir. 1992), (distinguished *Foster*, *supra*, and addressed the issue of whether in a pretext case a plaintiff must show that the employer's reason was a pretext for discrimination, the issue subsequently decided by *Hicks*) *cert. denied*, 113 S. Ct. 635 (1992).

Finally, Petitioner incorrectly argues that the decision below is in direct conflict with *Hazen Paper Co. v. Biggins*, 113 S. Ct. 1701 (1993). *Hazen Paper*, an ADEA case, does not remotely suggest that this Court intended to depart from the burden of proof standards enunciated in *Burdine* and *Price Waterhouse* to deal with the distinguishing aspects of mixed motive and pretext cases. Rather, the Court relied on *Burdine* by analogy to explain liability in a disparate treatment case under ADEA as requiring that the "protected trait actually motivated the employer's decision." *Id.* at 1706. Even after *Hazen Paper*, this Court in *Hicks* continued to apply the burden of proof standards enunciated in *Burdine* requiring the plaintiff to show in a Title VII pretext case that the employer's reason for the adverse action was false and that discrimination was the real reason. *Hicks*, 125 L. Ed. 2d 407 (1993).

The Third Circuit did not stray from this Court's precedent and accordingly review is unwarranted. Petitioner's refusal to

accept that there are differing burden of proof standards in pretext and mixed motives cases and that the jury charge did not reflect such differences, falls far short of the justification required for review by this Court.[8]

II. THE THIRD CIRCUIT REASONABLY INTERPRETED PENNSYLVANIA LAW IN FINDING THAT RESPONDENTS DID NOT "INITIATE" A MALICIOUS PROSECUTION AGAINST THE PETITIONER

This Court has afforded the courts of appeals great deference in the interpretation and application of state law, *Pembaur v. City of Cincinnati*, 475 U.S. 469, 484 n.13 (1986); *United States v. S.A. Empresa*, 467 U.S. 797, 815 n.12 (1984), and will accept a reasonable construction of state law "even if an examination of the state-law issue without such guidance might have justified a different conclusion," because the courts of appeals are better schooled in and more able to interpret the laws of their respective states. *Haring v. Prosise*, 462 U.S. 306, 314 n.8 (1983) (citing *Bishop v. Wood*, 426 U.S. 341, 346-47 n.10 (1976)).

Petitioner challenges the Third Circuit's interpretation of Pennsylvania common law with respect to the "initiation" element of malicious prosecution. Yet, the court's decision is supported by every Pennsylvania appellate decision on the issue. The issue addressed was whether under Pennsylvania common law of malicious prosecution, Respondents, private citizens who merely reported a crime to the police and provided them all the facts which were true, could nevertheless be found liable after the police decided to prosecute. (A. 36-37.) The court found Respondents could not and held "that when a person supplies accurate information to the police, that person, regardless of her motives and her actions in withholding other information, cannot be regarded as being responsible for the insti-

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8. The Third Circuit found that the jury charge did not accurately reflect the burden of proof for a plaintiff in either a pretext or a mixed motives case. (A. 51-52.) Rather, it simply combined both charges, stated them incorrectly, and contrary to *Price Waterhouse*, made no determination of whether the case was mixed motives or pretext. (A. 50-51.) *Price Waterhouse*, 490 U.S. 228, 247 n.12 (1989).

tution of criminal proceedings, so long as the police retain the complete discretion in determining whether to prosecute, and so long as that person does not conceal additional information requested by the police." (A. 37-38.)

The Third Circuit's holding was based on an interpretation of Pennsylvania law derived directly from the available and controlling decisions on the initiation element.[9] (A. 29-31); *see Campbell v. Yellow Cab Co.*, 137 F.2d 918, 921 (3d Cir. 1943); *Davis v. Equibank*, 603 A.2d 637, 640 (Pa. Super. Ct. 1992); *Hess v. County of Lancaster*, 514 A.2d 681, 683 (Pa. Commw. Ct. 1986). These cases apply comment g to Section 653 of the Restatement (Second) of Torts[10] which provides that private

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9. On malicious prosecution Pennsylvania courts follow the Restatement (Second) of Torts Section 653 which provides that a person who initiates or procures institution of criminal proceedings against another resulting in harm is responsible for any harm, if the proceedings were initiated with malice and without probable cause and the proceedings terminated in favor of the person accused. *See Kelley v. General Teamster's Local Union 249*, 544 A.2d 940, 941 (Pa. 1988); *Hugee v. Pennsylvania Railroad Co.*, 101 A.2d 740, 743 (Pa. 1954).

10. Comment g provides in pertinent part:

> A private person who gives to a public official information of another's supposed criminal misconduct, of which the official is ignorant, obviously causes the institution of such subsequent proceedings as the official may begin on his own initiative, but giving the information or even making an accusation of criminal misconduct does not constitute a procurement of the proceedings initiated by the officer if it is left entirely to his discretion to initiate the proceedings or not. When a private person gives to a prosecuting officer information that he believes to be true, and the officer in the exercise of his uncontrolled discretion initiates criminal proceedings based upon that information, *the informer is not liable . . . even though the information proves to be false and his belief was one that a reasonable man would not entertain*. The exercise of the officer's discretion makes the *initiation of the prosecution his own and protects from liability the person whose information or accusation has lead the officer to initiate the proceedings*.
>
> If however, the information is known by the giver to be false, an intelligent exercise of the officer's discretion becomes impossible, and a prosecution based upon it is procured by the person giving the false information. *In order to charge a private person with responsibility for the initiated, expressed by direction, request or pressure of any kind, was*

individuals, such as Respondents, who do not knowingly provide false information to the police, do not file a complaint, and do not request prosecution, cannot be held responsible for the initiation of the proceedings. Respondents did not file a complaint, provide false information to the police, or directly request or pressure the police to prosecute Petitioner. (A. 31-32.) Moreover, the Third Circuit found that Respondents did not conceal any information. (A. 32.)

No Pennsylvania court has refused to apply comment g and Petitioner does not dispute that comment g applies. Rather, he re-argues the same cases which the Third Circuit appropriately found distinguishable and not applicable because they involved persons who either swore out a complaint or directed that a prosecution be started against the accused. *Neczypor v. Jacobs*, 169 A.2d 528 (Pa. 1961); *Hugee v. Pennsylvania Railroad Co.*, 101 A.2d 740 (Pa. 1954); *Miller v. Pennsylvania Railroad Co.*, 89 A.2d 809 (Pa. 1952); *Byers v. Ward*, 84 A.2d 307 (Pa. 1951); *Wainauskis v. Howard Johnson Co.*, 488 A.2d 1117 (Pa. Super. Ct. 1985); *Shelton v. Evans*, 437 A.2d 18 (Pa. Super. Ct. 1981); *Biggans v. Hajoca Corp.*, 185 F.2d 982 (3d Cir. 1950). In short, these cases address the issue of whether the person who clearly initiated the proceeding had probable cause for doing so.

Petitioner trumpets *Simpson v. Montgomery Ward*, 46 A.2d 674 (Pa. 1946), as a case that is "controlling" and "dictates" an initiation element analysis that conflicts with the Third Circuit's decision. (Petitioner's Brief at p. 36) However, *Simpson* "dictates" nothing about the initiation element because the decision did not address the issue, let alone comment g. Rather, the sole issue before the court was whether the jury was properly charged on the question of want of probable cause. *Simpson*, 46 A.2d at 676. Since the Third Circuit based its decision to reverse solely on its interpretation of the initiation element, *Simpson* is neither controlling nor in conflict.

NOTES *(Continued)*

the determining factor in the official's decision to commence the prosecution, or that the information furnished by him upon which the official acted was known to be false.

Restatement (Second) of Torts § 653, comment g (1965) (emphasis added).

Where, as here, the state supreme court has not ruled on the issue before the interpreting court, that court must predict how the court would rule. *City of Philadelphia v. Lead Industrial Ass'n. Inc.*, 994 F.2d 112 (3d Cir. 1993). The Third Circuit's decision needs no review because in predicting how the Pennsylvania Supreme Court would consider the "initiation" issue its reasoning was supported by every appellate decision addressing the issue and was well versed in common sense and sound public policy.[11]

Because the decision below is supported by Pennsylvania law and is not contrary to any state supreme court pronouncement, the Third Circuit's interpretation and application of the Pennsylvania malicious prosecution law is not unreasonable and review is unwarranted.

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11. The Third Circuit stated:

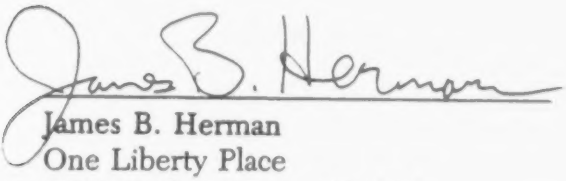
> Sometimes a private individual reporting information to the police will not have a well-formed belief in the suspect's guilt, but instead will be aware only of some facts that might point to that suspect. For instance, in reporting a robbery suspect, a witness might not be able to state with certainty that the suspect perpetrated the crime, but might be able to state only that the suspect resembles the perpetrator.
>
> . . . .
>
> We think that the Supreme Court of Pennsylvania would hold that the duty falls on the police and the prosecuting authorities, and not on a private individual supplying information, to determine what are the significant facts in an investigation.
>
> . . . .
>
> Thus, an informant has neither a duty to consider what information the police reasonably might need to conduct a complete investigation nor a duty to be certain that a suspect is guilty before giving *any facts* that would be helpful to the police.
>
> A requirement that a private party have a duty beyond reporting information inevitably would discourage persons from imparting their suspicions to the police and in some cases effectively would shift the duty of criminal investigation from law enforcement professionals to the private individuals. Furthermore, imposition of such a duty cannot be reconciled with the recognition of the Pennsylvania courts that in balancing the conflicting interests of society in law enforcement on the one hand and the individual in freedom from false accusation on the other, "[c]learly, the interest in preservation of the public order is 'the more important of the conflicting public policies.' "

(A. 36-38.) (citations omitted).

CONCLUSION

For the foregoing reasons Respondents respectfully request that this Court deny the Petition For A Writ Of Certiorari.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of the foregoing Brief In Opposition to Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit were served upon counsel for Petitioner Jackey B. Griffiths on August 13, 1993 by hand delivery to:

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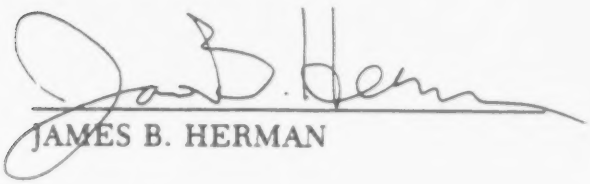

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